DEC 28 2001

CLERK

No. 01-731

IN THE

Supreme Court of the United States

GERALD GOLDBERG,

Petitioner,

v.

JAMES ELLETT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JAMES ELLETT

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REASONS FOR DENYING THE WRIT

A. THE TAX INJUNCTION ACT

Petitioner erroneously equates a valid bankruptcy discharge of state taxes to a suit challenging the application of state tax laws.

The Tax Injunction Act is directed to suits in which the plaintiff is "challenging the (validity or) application of state tax laws" (Pb 3)[1] and to prevent injunctive or declaratory relief in connection with such a challenge in the federal court where an adequate state remedy is available.

This case does not challenge or dispute any state taxing laws. Respondent

> does not challenge the lawfulness of California's income tax code, nor does he question the State's authority to assess those income taxes in the first instance. Instead, he merely seeks to prohibit Goldberg from violating federal bankruptcy law by collecting the pre-petition taxes at issue as if they were continuing obligations owed to the State notwithstanding the bankruptcy court's discharge order.

(Pb App. 19a.)

The Ninth Circuit's decision, by holding that the Tax Injunction Act does not apply to bankruptcy, properly holds that a bankruptcy discharge is not a challenge to

1. Pb refers to Petitioner's brief

the states taxing laws or tax administration, thus, the Tax Injunction Act does not apply to such a discharge.

Petitioner's position regarding the states' concurrent jurisdiction with the bankruptcy court to decide tax discharge issues adds no support to granting the writ.

Respondent's discharge does not raise any issues of state law that would affect the discharge or any state interest in the discharge. In Respondent's Chapter 13 the state was duly scheduled and noticed and the state failed to file a claim as a result of which the state was not paid and the unpaid taxes were discharged as a matter of law. (Pb App. 2a.) *In re: Tomlin*, 102 BR 290 (ED Wash. 1989), 907 F.2d 114 (9th Cir 1990), *codified by* 11 U.S.C. § 502(b)(9) as to cases filed after October 22, 1994; *New York v. Irving Trust Co.*, 288 U.S. 329 (1933). (Pb App. 10a.)

Additionally, Petitioner's position clearly attempts to eliminate the concept of concurrent jurisdiction and to replace it with exclusive state jurisdiction of bankruptcy discharges of state taxes in cases where there is no state tax law in dispute.

Petitioner's unauthoritative position advocates the expansion of the Tax Injunction Act into the area of bankruptcy discharges where no state taxing law is challenged and to transfer the administration of the uniform federal bankruptcy code to the jurisdiction of the diverse and separate state laws of the several respective states.

The Ninth Circuit's decision is consistent with existing law and does not contravene the Tax Injunction Act or any decision of this Court regarding *Ex Parte Young*. In fact, it is

in strict compliance with the *Ex Parte Young* doctrine. Accordingly there is no compelling reason for the review of the decision of the Ninth Circuit.

B. *EX PARTE YOUNG*, THE *COEUR d' ALENE* LIMITATION

There is no dispute of the importance of the sovereignty of a states taxing administration as this court has established in *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) and *Arkansas v. Farm Credit Service*, 520 U.S. 821, 826 (1997) and that Congress, through the Tax Injunction Act has expressed its assent. (Pb 14.)

However, both *National Private Truck* and *Arkansas* involved direct challenges to the states taxing laws and the Tax Injunction Act duly applies to such challenges, but not to a bankruptcy discharge in which there is no such challenge. Or, there can be no intrusion to state tax administration if there is no challenge to state tax laws and administration.

Assuming that Challenges to state tax collection fit into the same category as the challenge to state title to submerged lands at issue in *Coeur d' Alene* (Pb 14) would be true only if such challenges were in direct dispute with state lax laws or the administration of those laws.

In this case Respondent does not dispute any state tax laws but only seeks to enjoin the continuing violation of the bankruptcy courts discharge order as recognized by the Ninth Circuit at Pb App. 9a.

Petitioner appears to urge at Pb 15 that although the instant case may not have a significant impact on the states

treasury, the cumulative effect of all California bankruptcies would. Thus, a bankruptcy discharge rises to the level of the *Couer d'Alene* limitation which should have been recognized by the Ninth Circuit.

Petitioner fails to recognize that in a bankruptcy discharge there is no affront to the state's tax laws and does not require the state to perform any affirmative act or to amend or modify its taxing laws.

The materially of prospective relief accorded pursuant to *Ex Parte Young* does not invalidate *Ex Parte Young*. "Application of *Ex Parte Young* may have a substantial ancillary effect on a State's treasury." Pb App. 20a citing *Edelman v. Jordan*, 415 U.S. 651, 667 (1974).

The Ninth Circuit's holding that the *Couer d' Alene* limitation does not apply to actions seeking to enjoin state collection of taxes in a bankruptcy proceeding does not conflict with the Tenth circuit in *ANR Pipline, Inc. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998) as set forth at Pb 15.

ANR involved a direct frontal attack on the State of Kansas' application of its state taxing laws and sought to force the state of Kansas to extend to *ANR* the same tax treatment that it applied to railroads.

The Ninth Circuit did not rule that the *Coeur d' Alene* special sovereignty interest limitation to *Ex Parte Young* did not apply to state tax collection. (Pb 6.)

The Ninth Circuit considered the relief sought in *Coeur d'Alene*, which produced the limitation, and compared it with the relief sought by Respondent and stated: "We well

recognize the profound nature of this interest, but we believe that Goldberg seeks to frame the issue before us at too broad a level of generality." (Pb App. 19a.)

The Ninth Circuit concluded therefrom "the relief requested by the Tribe in *Coeur d' Alene* would have extinguished the states control over a vast reach of lands and waters, 521 US 282". (Pb 20a.) "In contrast and analogous to the Tribe's action in *Agua Caliente*, Ellett simply seeks prohibitory relief preventing Goldberg from violating the bankruptcy courts discharge injunction by attempting to collect from Ellett specific pre-petition income tax obligations duly discharged in bankruptcy under federal law." (Pb App. 20a.)

Petitioner's position violates the very nature of the *Coeur d'Alene* limitation and advocates such limitation should be generally and blindly applied without evaluation of the specific relief sought. On the other hand the Ninth Circuit has applied the very essence of the *Coeur d'Alene* exception by looking into that which Respondent seeks in comparison to that which the Tribe sought and the degree of intrusion upon the state's sovereignty interest, if any, such relief would have.

Accordingly, the Ninth Circuit has not contravened any provision of the *Coeur d'Alene* limitation and the writ should be denied.

C. *EX PARTE YOUNG*, THE *SEMINOLE* LIMITATION

Ex Parte Young does not interfere with the Tax Injunction Act. The Tax Injunction Act, as historically applied, prohibits the application of *Ex Parte Young* when the relief sought

results in a challenge to the state's taxing laws. The Tax Injunction Act does not apply to bankruptcy discharges where no tax laws are being challenged, thus, there is nothing to interfere with.

Petitioner is misled that *Ex Parte Young* would allow federal courts to enjoin collection of federal taxes. Just the reverse is true. The Tax Injunction Act prohibits the use of *Ex Parte Young* to enjoin the collection of state taxes when such collection arises out of a dispute with the state regarding state tax laws. The Tax Injunction Act prohibits the federal courts from interfering with a state's tax laws in the federal courts. Conversely, the Tax Injunction Act does not permit the state to interfere with the application of federal bankruptcy administration and discharges where no state taxing laws are challenged.

The statutory scheme in *Seminole* was contained in the very federal act that was sued upon and contained substantial limitations that would have been ignored by using *Ex Parte Young*. Also the relief sought in *Seminole* was not prospective in nature and required the state officials to engage in affirmative acts. The Tax Injunction Act is not such a remedial scheme, is not part of the Bankruptcy Code sued upon herein and does not apply to bankruptcy discharges where no state taxing law is challenged.

There is no conflict with the Tenth Circuit in that the *ANR* case did not involve a bankruptcy discharge but was a direct frontal attack on the state of Kansas' tax laws and administration.

Petitioner's position is an attempt to engraft the Tax Injunction Act onto the Bankruptcy Code and thereby destroy

the uniform administration of bankruptcy discharges and place that administration in the hands of the states to be administered by the diverse laws of the several states.

This attempt violates the vast array of legal authority to the contrary in limiting the Tax Injunction Act to those cases where there is a challenge to the states' sovereign taxing laws.

CONCLUSION

It is clear from the entire record of this case that Petitioner is proceeding upon what he wishes the applicable law to be by citing and applying broad non material generalities to the specific's of this case when in fact those generalities simply do not apply and contradict the well established law applicable to this case. Accordingly the writ should be denied in that no useful purpose would be served by the courts review of the case, except to affirm existing law.

Respectfully submitted,

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